IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT A. WRIGHT and DEEANN K. WRIGHT, Plaintiffs, vs. BROOKE GROUP LIMITED, et al., Defendants.	No. C99-3090MWB **MEMORANDUM OPINION AND ORDER REGARDING CERTAIN DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COUNTS VI-VIII**

I. INTRODUCTION AND BACKGROUND

This matter is before the court pursuant to certain defendants' December 15, 2000, Motion to Dismiss Plaintiffs' Amended Counts VI-VIII (#86). Plaintiffs resisted this motion, arguing that the court should deny defendants' motion because, when viewed as a whole, their allegations of fraud satisfy the standards of Federal Rule of Civil Procedure 9(b). In the alternative, and in the event that this court does not find that their amended complaint adequately pleads fraud, plaintiffs ask that they be allowed to amend the complaint a second time.

On October 29, 1999, plaintiffs Robert and DeeAnn Wright brought suit against various cigarette manufacturers in state court alleging that Robert Wright suffered physical injuries as a result of his use of the defendants' tobacco products. On November 26, 1999, defendants removed this case to federal court based on diversity jurisdiction. An initial motion to dismiss was filed by defendants on January 21, 2000, which was extensively briefed and zealously argued by both parties. On September 29, 2000, this court entered a Memorandum Opinion and Order Regarding Certain Defendants' Motion to Dismiss, concluding, *inter alia*, that plaintiffs' claims for fraudulent misrepresentation and fraudulent

nondisclosure failed to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). Rather than dismissing those claims, however, the court granted plaintiffs leave to amend their complaint in order to cure those deficiencies. On November 15, 2000, the plaintiffs filed their amended complaint. Contending that plaintiffs' amended complaint still "falls well short of complying with Rule 9(b) and this Court's September 29, 2000, Order," the defendants filed a second motion to dismiss, which, as stated previously, is now before the court. Plaintiffs resisted this motion, and along with their resistance, they attached and submitted proposed amendments (Exhibit A) to the amended complaint. In their reply, defendants maintain that plaintiffs' fraudulent misrepresentation and fraudulent nondisclosure claims remain deficient, and that plaintiffs' proposed amendments do not address these deficiencies. On March 2, 2001, at the request of both parties, a hearing was held on this motion.

II. LEGAL ANALYSIS

A. Standards For Motions To Dismiss

The present motion to dismiss involves the interrelationship of two sets of standards: the standards for dismissal for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and the standards for pleading fraud with particularity stated in Federal Rule of Civil Procedure 9(b). This court has considered in some detail the standards applicable to motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) in a number of published decisions. *See, e.g., Adler v. I & M Rail Link, L.L.C.*, 13 F. Supp. 2d 912, 917 (N.D. Iowa 1998); *Terra Indus., Inc. v. Commonwealth Ins. Co. of Am.*, 990 F. Supp. 679, 682 (N.D. Iowa 1997); *Leiberkneckt v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 302 (N.D. Iowa 1997); *North Cent. F.S., Inc. v. Brown*, 951 F. Supp. 1383, 1404 (N.D. Iowa 1996); *Powell v. Tordoff*, 911 F. Supp. 1184, 1188 (N.D. Iowa 1995); *Quality Refrigerated Services, Inc. v. City of Spencer*, 908

F. Supp. 1471, 1489 (N.D. Iowa 1995); *Reynolds v. Condon*, 908 F. Supp. 1494, 1502 (N.D. Iowa 1995); *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 681 (N.D. Iowa 1995). Likewise, the court has previously reviewed the specific pleading requirements of Federal Rule of Civil Procedure 9(b) in several published decisions. *See, e.g.*, *Brown v. North Cent. F.S., Inc.*, 987 F. Supp. 1150, 1155 (N.D. Iowa 1997); *Brown v. North Cent. F.S., Inc.*, 173 F.R.D. 658, 664 (N.D. Iowa 1997); *Brown*, 951 F. Supp. at 1404; *De Witt v. Firstar Corp.*, 879 F. Supp. 947, 970 (N.D. Iowa 1995). Indeed, in this case, the court reviewed these sets of standards in some detail in its prior order regarding defendants' previous motion to dismiss. Because the court does not find that intervening decisions have altered these standards in any way, it will not repeat the discussion of those standards here.

B. Plaintiffs' Fraud Claims

The defendants assert that the plaintiffs have failed to plead their fraud claims with sufficient particularity as required by Federal Rule of Civil Procedure 9(b),[1] and, therefore, have failed to state a claim upon which relief can be granted. In contrast, the plaintiffs maintain that their fraudulent misrepresentation and fraudulent nondisclosure claims here are sufficient under the standards of Rule 9(b). The court, therefore, must determine whether the plaintiffs have pleaded their fraud based claims with sufficient particularity in their amended complaint.

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[1]Federal Rule of Civil Procedure Rule 9(b) provides as follows:

> (b) **Fraud, Mistake, Condition of the Mind**. In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED.R.CIV.P. 9(b).

1. Fraudulent Misrepresentation

Defendants contend that the plaintiffs' fraudulent misrepresentation claim remains deficient because plaintiffs have not identified when Mr. Wright saw the advertisements, where he saw them, or how they are fraudulent. Defendants also assert that the plaintiffs have failed to allege actual reliance with particularity. The court will address defendants' contentions regarding the alleged deficiencies contained in plaintiffs' amended complaint in turn.

a. Sufficiency of pleading time, place, and content

Defendants assert that plaintiffs' amended complaint fails to plead the requisite particularity with respect to when and where Mr. Wright saw or heard the specific advertisements set forth in ¶ 10.4 of the amended complaint. Defendants contend that plaintiffs' proposed amendment to ¶ 10.3 does not cure these deficiencies because it only states when Mr. Wright began to smoke and does not indicate when, or even if, Mr. Wright stopped smoking and where Mr. Wright saw or read the advertisements. Specifically, defendants state that, "Plaintiffs simply leave Defendants and the Court guessing as to when and where during a span of half a century Mr. Wright saw or read the specific advertisements set forth in Paragraph 10.4." Defendants' Reply Brief at 4. These deficiencies, defendants argue, render Mr. Wright's fraudulent misrepresentation claim insufficient under Rule 9(b).

Initially, the court is unconvinced that plaintiffs' failure to plead when, or even if, Mr. Wright stopped smoking renders their amended complaint insufficient under Rule 9(b). Plaintiffs' proposed amendment to ¶ 10.3 states the following:

> Plaintiff, Robert A. Wright's, first use of cigarettes was in 1953 at the age of 12 or 13 and at all times material, and during the period that he smoked, Plaintiff Robert A. Wright smoked and also saw and/or read advertisements for the following brands of cigarettes: Chesterfield, Doral, Marlboro, Malboro Lights, and Doral Lights.

Plaintiffs' Proposed Amended Complaint at ¶ 10.3, Exhibit A. The court finds that at this stage in the proceedings, the defendants, as well as the court, can accept that Mr. Wright did not stop smoking until the filing of his original complaint, which was October of 1999. The exact date when, or even if, Mr. Wright quit smoking is information that can be acquired through discovery.[2] Admittedly, this court, in its earlier ruling criticized plaintiffs' fraudulent misrepresentation claim because plaintiffs pled "wide time frames during which representations were allegedly made fail to provide the specificity required by Rule 9(b)" and "failed to allege where any of the alleged false statements were published or made available to the general public." *Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 834 (N.D. Iowa 2000). The court made these statements in reference to plaintiffs' original complaint which was dismissed because the fraud allegations were conclusory and not pled with the sufficient particularity that is required by Rule 9(b). However, with the addition of myriad factual allegations in plaintiffs' amended complaint, this is no longer the case. Indeed, in their original complaint, plaintiffs asserted broad and sweeping allegations of fraud against the defendants whereas in their amended complaint, plaintiffs delineate particular factual allegations, including the specific advertisements upon which Mr. Wright relied. The fact that Mr. Wright does not allege where or when he saw or read the advertisements is not fatal here, because the defendants know which of its advertisements Mr. Wright alleges are fraudulent.

Thus, the court recognizes that plaintiffs do not plead where or when Mr. Wright saw

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[2]Defendants also contend that because plaintiffs fail to plead the dates when Mr. Wright saw or heard particular advertisements they are unable to compare the dates Mr. Wright started smoking, switched brands (i.e. to a filtered or lower tar cigarette), quit or attempted to quit, resumed smoking, or otherwise altered his smoking practices, which impedes their ability to fairly evaluate causation and actual reliance. The court finds that plaintiffs are not required to plead this type of information; rather, this is the type of information that is properly obtained through the discovery process.

or read the advertisements. However, in considering whether plaintiffs' pleadings, taken as a whole, satisfy the particularity requirements of Rule 9(b), in light of the circumstances in which the fraud claims arise here, the court finds them adequate, albeit just barely. The uncertainties about pleading when and where Mr. Wright saw or read the advertisements can be balanced against the certainty with which plaintiffs plead the specific advertisements of the alleged misrepresentations, the identity of the manufacturer of the advertisement[3], and knowledge of falsity, which will be discussed below. *See Roberts v. Francis*, 128 F.3d 647, 651 n.5 (8th Cir. 1997) ("A Plaintiff need not show each factor to plead fraud with sufficient particularity. Instead, a Plaintiff must state enough so that the pleadings are not merely conclusory."). A liberal reading of plaintiffs' fraudulent misrepresentation claim in its entirety, therefore, establishes, albeit just barely, that it is pled in accordance with Rule 9(b). The court is satisfied that the amended complaint is pled with enough specificity so that the defendants know the nature of the fraudulent misrepresentation claim and the specific statements on which it is based.

Defendants further contend plaintiffs' amended complaint fails to allege any facts showing that any statement quoted from the advertisements was untrue. Defendants contend that the plaintiffs' allegations are conclusory, and, therefore, do not satisfy the particularity requirements of Rule 9(b). The court disagrees with defendants' characterization of plaintiffs' amended complaint. Although plaintiffs categorically allege that the representations made in the advertisements were false, *see* ¶ 10.5, plaintiffs proceed to set forth specific facts supporting why these representations were allegedly false. *See* ¶ ¶ 10.6-10.47. Defendants also argue that the statements that the plaintiffs quote from the

[3]Defendants contend that plaintiffs do not identify the speaker, i.e. the manufacturer of the brand for each referenced advertisement, in the amended complaint. However, as plaintiffs point out, they identify the brand name associated with each advertisement, and since each brand is only manufactured by one manufacturer, this identifies the speaker.

advertisements are benign, or at most, constitute opinion or nonactionable "puffing" and should be disposed of as a matter of law. Defendants are correct to the extent that statements which are "puffing" or opinion do not give rise to a claim of fraud. *See Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 827-28 (N.D. Iowa 1997) (analyzing distinctions between nonactionable statements of opinion and actionable misstatements of fact). Plaintiffs' amended complaint, however, contains sufficient allegations of factual misrepresentations to support their fraud claim, enough so to avoid dismissal at this stage. For example, in their amended complaint, ¶ 10.4 identifies specific advertisements of various tobacco companies seen or read by Mr. Wright and on which he relied in beginning or continuing to smoke. Paragraphs 10.6-10.47 identify specific statements, including dates, made by the tobacco companies, including specific representations allegedly made by Philip Morris, R.J. Reynolds and Liggett. These paragraphs further identify specific information allegedly known by the tobacco companies as to the hazards associated with their products and when they knew this information. The court finds that these allegations of fact demonstrate that it is reasonable to believe that defendants knew that the alleged misrepresentations were materially false or misleading when made. *Brown*, 173 F.R.D. at 670 (citations omitted). Plaintiffs' fraudulent misrepresentation claim may not, therefore, properly be disposed of on a motion to dismiss. Whether or not the facts asserted by plaintiffs in their amended complaint will be sufficient to overcome summary judgment, after discovery is conducted in this case, is an entirely different question, the resolution of which shall be left for another day.[4]

[4]This court notes that in *Midwest Printing, Inc. v. AM Intern., Inc,*, 108 F.3d 168 (8th Cir. 1997), a decision upon which defendants rely in support of their proposition that whether particular representations are nonactionable "puffing" or opinions can be decided as a matter of law, the Eighth Circuit Court of Appeals affirmed a district court's decision to reject plaintiff's fraud claim on a motion for summary judgment. *Id.* at 171.

b. Sufficiency of pleading actual reliance

Additionally, defendants argue that merely alleging, in a conclusory manner, that Mr. Wright "reasonably relied thereon" on the alleged misrepresentations set forth in the amended complaint lacks the particularity required by Rule 9(b). Admittedly, while each allegation does not, in its body, include a statement that Mr. Wright relied on the specific representation, plaintiffs' amended complaint does allege elsewhere the following:

> 10.45 The misrepresentation, omissions and concealments were made deliberately, willfully, maliciously and/or recklessly with the intent to mislead Plaintiff into reliance upon them and were material in causing Plaintiff to purchase Defendants' cigarettes.
> 10.46 Plaintiff had no way to determine that the misrepresentations and concealments were false and misleading, and that they included material omissions, and Plaintiffs reasonably relied thereon.

Plaintiffs' Amended Complaint at ¶ ¶ 10.45-10.46. While the court finds that plaintiffs could have pleaded reliance with more particularity, their failure to do so here is not fatal, because the court concludes that based on a liberal reading of plaintiffs' amended complaint they have pled actual reliance with adequate particularity.

2. Fraudulent Nondisclosure

Defendants contend that the plaintiffs have also failed to cure the deficiencies the court outlined in its November 29, 2000, decision with respect to their fraudulent nondisclosure claims. Specifically, defendants contend that the plaintiffs have failed to plead with sufficient particularity circumstances constituting fraudulent nondisclosure, namely, information relating to time, place and identity. The court disagrees that plaintiffs have failed to cure the deficiencies in their amended complaint.

In their amended complaint, plaintiffs allege that defendants possessed superior knowledge with respect to the addictive nature of nicotine, the level of nicotine used in defendants' tobacco products, and the relationship between smoking cigarettes and disease.

Plaintiffs allege that defendants had a duty to disclose such information because of their superior knowledge regarding their cigarettes and that Mr. Wright relied on the defendants because of their superior knowledge. Plaintiffs set forth specific facts demonstrating that each defendant allegedly knew that cigarettes caused disease, that nicotine was the pharmacologically active ingredient in their products, that cigarettes were addictive, that sale of their product depended on the addictiveness of the cigarettes, and that they did not inform their consumers. *See e.g.*, ¶ ¶ 10.25.1-10.25.14, 10.25.17-10.25.20, 10.27-10.30; 10.34-10.43. Morever, specific allegations are made concerning defendants' manipulation of the nicotine levels in their cigarettes. *See e.g.*, ¶ ¶ 10.25.13, 10.25.15, 10.25.16, 10.25.18-10.25.20, 10.27-10.31, 10.33-10.37, 10.44. These allegations, contrary to defendants' contentions, include information relating to time, place, and identity. Plaintiffs further allege that:

> The undisclosed information was material to Plaintiff Robert A. Wright's decision making as to whether to use Defendants' tobacco products. Plaintiff Robert A. Wright relied upon what the Defendants did not say during the years that he smoked. If Plaintiff had been aware of the undisclosed information, he would not have started to smoke or would have attempted to quit before he became addicted.

Plaintiffs' Amended Complaint at ¶ 11.5. The court concludes that after a review of the amended complaint, plaintiffs have alleged and supported all the elements of their fraudulent nondisclosure claim.

3. Conspiracy

Here, because the court has found that the deficiencies in plaintiffs' underlying fraud claims have been cured by the amended complaint, and proposed amendments, the court denies defendants' motion to dismiss plaintiffs' fraud-based conspiracy claim.

III. CONCLUSION

The court concludes that plaintiffs' fraudulent misrepresentation and fraudulent nondisclosure claims in the amended complaint, taking into consideration the proposed amendments, are pled, albeit just barely, with the particularity required by Federal Rule of Civil Procedure 9(b). Therefore, certain defendants' motion to dismiss plaintiffs' amended fraud claims, counts VI and VII, is denied. Because plaintiffs' fraud claims are pled in accordance with Rule 9(b), certain defendants' motion to dismiss plaintiffs' fraud-based conspiracy claim, count VIII, is also denied. Thus, the court concludes that Certain Defendants' Motion to Dismiss Amended Counts VI-VIII (#86) is **denied in its entirety**. Additionally, plaintiffs' Alternative Motion for Leave to Amend the Complaint is **granted**. Plaintiffs are hereby granted leave to amend their Amended Complaint consistent with the proposed amendments in Exhibit A and in accordance with Local Rule 15.1.[5]

IT IS SO ORDERED.

DATED this 9th day of March, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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[5]N.D. IOWA LR 15.1 provides:

The motion to amend a pleading shall specifically state in the motion what changes are sought by the amendment. Any party submitting a motion to amend shall attach to the motion the original of the proposed amended and substituted pleading. Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must, except by leave of court, reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference. If the motion is granted, the clerk shall then detach the amended and substituted pleading and file it when the order granting the motion to amend is filed.